IN THE COMPETITION APPEAL TRIBUNAL Case Nos. : 1342/5/7/20;1409-10/5/7/21 (T)

AND

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD) Claim Nos: IL-2020-000040
IL-2021-000002
IL-2021-000003

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP
(Remote Hearing)

Wednesday 16 February 2022

Before:

The Honourable Mr Justice Marcus Smith
(President of the Competition Appeal Tribunal)

Sitting as a Tribunal in England and Wales and as a Judge of the High Court of England and Wales

BETWEEN:

(1) SPORTRADAR
(2) SPORTRADAR UK LIMITED

Claimants

- v -

(1) FOOTBALL DATACO LIMITED
(2) BETGENIUS LIMITED
(3) GENIUS SPORTS GROUP LIMITED

Defendants

AND BETWEEN:

FOOTBALL DATACO LIMITED

Claimants

- v -

SPORTRADAR AG AND OTHERS

Defendants

AND BETWEEN:

BETGENIUS LIMITED

Claimants

- v -

SPORTRADAR AG AND OTHERS

Defendants

AND BETWEEN:

(1) - (15) GENIUS SPORTS TECHNOLOGIES LIMITED AND OTHERS

Claimants

- v -

(1) – (6) SOFT CONSTRUCT (MALTA) LIMITED AND OTHERS

Defendants

A P P E A R AN C E S

Alan Bates and Ciar McAndrew (On behalf of Sportradar AG, Sportradar UK Limited, Peter Kenyon, Isaiah Gardner, Floyd March, Nick Mills and Przemyslaw Dubinin)
Henry Edwards (On behalf of Football DataCo)
Tom de la Mare Q.C. (On behalf of BetGenius Limited and Genius Sports Group Limited)
Conall Patton Q.C., Philip Roberts Q.C. and Jennifer MacLeod (On behalf of SCM)
Kendrah Potts (On behalf of IMG)

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Wednesday, 16 February 2022

(9.00 am)

Opening remarks

THE JUDGE: Good morning, everyone. As I just indicated, these proceedings are being live streamed, so I will give the usual warning against photographing, recording or transmitting the proceedings. They are being recorded by us, but no one else should do so.

More helpfully, can I thank the parties for their written submissions which I have read. As I understand it, we have three matters on the agenda. First, ensuring so far as possible, common outcomes for the competition issue between the two matters; secondly, disclosure; and thirdly, the trial timetable. I think there has been some movement on all of those issues, but those are the three that I believe are live.

I also understand we are time limited. I think it is SCM who can't --

MR PATTON: My Lord, if I identify myself for the transcript, it is Conall Patton for SCM.

There is no longer any constraint on our part.

THE JUDGE: That is helpful, thank you.

Mr de la Mare?

MR DE LA MARE: Yes, my Lord. I think there is a fourth issue as well, which is the issue of whether or not there should be a stay of the competition issues in the SCM proceedings.

THE JUDGE: I understand.

Submissions by MR DE LA MARE

MR DE LA MARE: I am going to go with "sir", although I know you wear multiple hats and I will probably slip into calling you "my Lord" at various points. You

know the various parties before you, I am not going to do any of that.

The intervention. There are, I think, two principal issues in relation to the intervention, the topic of binding effect and how far does bindingness go and what are the consequences of SCM's decision as to how it now intends to put its case; that is topic one. Topic 2 is the question of disclosure, and then topic 3, I mention simply for completeness, is intervention by IMG. You may want to hear from Ms Potts as to what her position is in relation to that.

The key area of ambiguity in terms of binding effect is really the topic of market definition. It has been market definition which has driven my client's concerns about overlap between the SCM proceedings and Sportradar proceedings from the very outset. By from the very outset, I mean even back when the case being advanced by SCM was a fundamentally different one, directed at 100 plus data rights agreements, because of course, that old, abandoned Article 101 case still turned on the same question of market definition.

Now the issue that really arises is this. Despite the superficial similarities between the position of SCM and Sportradar, there are in fact some appreciable differences between their cases. You have seen in our skeleton we identify them being directed to both what it is that is the conduct at the heart of the case, what is seeking to be legitimated, the background private law rights and it is also in relation to the particular theory of harm. In particular, whether or not they identify a single, if you like, carved out sports rights market, which is the position of Sportradar.

They say it is FDC data and that alone that occupies a unique position because of the peculiar popularity of domestic league football for betting punters and bookmakers in the UK, or whether or not there is a wider category of Flagship Events which transcends the FDC data and embraces events as niche or

esoteric in the eyes of the UK bookmaker as Serie A football or European basketball, EuroLeague basketball.

The first point to note is that contrary to something suggested by FDC, there is no lack of pleading or particularity in the case that's been pleaded out by SCM. They put in very, very fully particularised defence and counterclaim to which we have pleaded fully in our reply and defence to counterclaim and all of that, as I will explain, is based upon the expert report and the theory of harm in Mr Latham's report.

At the heart of both cases is the hotly contested issue of market definition and both SCM and Sportradar push for a very narrow definition of the markets for the rights pertaining to certain sporting events.

What then of the difference and how it explains how the case is being put? The first difference is that the Sportradar case is principally about access to stadia. Because what they complain about -- and it is front and centre of their defence to the scouting claims and their scouting operation is, if you like, unabashed, there is nothing coy about their position as to how they want to go about gathering their data -- their case is that the ejection of their scouts is unjustified because competition law requires them to be given access to make their own rival database. That's the heart of their case.

Their theory of harm in relation to that is in very substantial part because they say that they want non-priced parameter competition in relation to how data is gathered at that very first stage, so that they can make new products and improve the quality of what's on the market. That's how they explain the peculiarly evil foreclosing effects of the arrangements upon them, and that's how they effectively explain why it is the ejection of scouts is unjustified and why it is that notwithstanding the fact that others compete with either the

secondary supply or through off-tube, there is some particular evil in them not being allowed to make their own databases.

That is their theory of foreclosure. I can take you through the claim and show you where it is pleaded out but it is probably not necessary.

It, of course, informs the structure of their case because it explains why the abuse of dominance case is directed at FDC and FDC alone because it is only FDC that can licence access to the stadia, and then explains why the case against my clients is put on the basis of Article 101 and Chapter 1 alone, because the agreement, if you like, is the consequence of the abuse of dominance pleaded against FDC.

Compare and contrast the case of SCM. Their case is principally a classic McGill case, because what they are complaining about much more front and square is the failure to licence to them the database that we have in fact collected. What you will immediately notice from their pleading is the centrality of the argument based upon single-source UK bookmakers and their requirements. Their arguments for multiple Flagship Events are really founded on the needs of those UK small bookmakers who want to take the data from just one source which in turn leads to a so-called turnkey provider, sports provider providing that single source, and it is those things that the turnkey provider needs to have in their package to sell as a comprehensive single source that explain what are the Flagship Events. That is a distinct and very different competition theory of harm.

More to the point, the positions are, ultimately, potentially cutthroat, because Sportradar holds a large number of DRAs in relation to a large number of areas where you would have thought that there would be candidates for Flagship Events. You have the example we have given in the skeleton

argument, the newly concluded UEFA agreement. That is a particularly striking one, but other examples abound. Take the example of basketball for instance. The two IMG competitions in relation to basketball are European basketball. Sportradar holds the exclusive rights to the NBA, the American basketball competition which you might think attracts similar or perhaps greater, perhaps lesser, who knows, interest from UK basketball fans who are a minority interest, you would have thought, in the grand scheme of UK bookmaking.

So there is an obvious potential, once you are going down the route of saying basketball fans are key input for a UK small, single-source bookmaker, to say: well, it is not just the Euro League stuff you require, it is the NBA stuff. So there is a potential for cutthroat in those circumstances.

Now we had understood that what SCM wish to do was to lead its own factual evidence and its own expert evidence in order to advance its own alternative theory of harm. That was the position before you last time. That was the proposal before you last time.

The position as it now is, is that SCM no longer wishes to advance factual or expert evidence --

THE JUDGE: In this case?

MR DE LA MARE: In this case.

THE JUDGE: Yes.

MR DE LA MARE: In this market definition exercise. The question is, therefore, what are the consequences of its failure to engage with the market definition exercise?

The first point is that our experts are going to have to engage with all of the relevant theories of harm in order to assess what the relevant market is, what its

relevant market tiers are, the sports data suppliers, the betting product suppliers, the turnkey solution providers, et cetera, what the relevant case before closure might be and what the relevant countervailing interest and countervailing market power may be. As part and parcel of that, the experts are going to have to consider whether or not there is a single market for live data, two markets, where the football data alone is special, or multiple markets, where there are multiple Flagship Events and then how bookmakers manage that scenario in terms of playing one events holder off another, via bundling, et cetera, and whether those techniques manage any potential effects of foreclosure, et cetera.

So the case posited by SCM is going to have to be investigated and considered in that context, if only to be rejected, if only to be understood and then discarded. Because it is all part and parcel of the market investigation that is required and there is only one market investigation result that will prevail at the end of the day.

THE JUDGE: That's the question, isn't it?

MR DE LA MARE: It is.

THE JUDGE: We know from other cases that there is no clear mechanism for avoiding inconsistent results in different cases. We know that from the MIF cases, Sainsbury's et al.

As I see it, what parties are trying to do, and entirely laudably, is to ensure that there is not the sort of mismatch that occurred in the “Mastercard” / “Visa” cases. But there is a reason one sees this as an intractable problem, because you don't have a rule of law that obliges SCM to participate, and you don't have a rule of law that binds them to the outcome, unless they wish it to be so.

So I have every sympathy with taking steps to put the Tribunal in the best position to

ensure a degree of consistency, and intervention seems to me a good idea, but absent consent, I think it is quite difficult to shoehorn an unwilling party into a situation where even if taking a step back and viewing matters from a distance, it is a good thing. I don't think one can impose that outcome.

Now that is my concern with the proposals that you articulate in your written submissions, the sort of three options that you set out. Because they are all very sensible, but they all suppose that the sensible solution is one that must inevitably be arrived at. For my part, I think -- and this is why I raise it, because I think you do need to address me on this -- for my part, I have some difficulty in compelling that solution, no matter how sensible it might be. It is one of those situations where we can assist -- and I think intervention is a good thing and I think trying to ensure that the same judge tries both proceedings is a good thing, so that the parties in the later action are under no illusions that what informed the court in the earlier case is likely to be carried over into the other case. But can I go beyond that?

MR DE LA MARE: With respect, you can, my Lord.

THE JUDGE: Okay.

MR DE LA MARE: Because the situation that confronts you is that there are two pleaded cases. It is not a case of intervention, either in the sense of an NGO wishing to be heard on an issue of pressing concern or a trade association like the Developers Association that was before you yesterday in the GIPHY case. It is not a case of a complainant.

This is a case of a claimant, a competition law claimant, someone who has articulated a competition law case in parallel proceedings, effectively being required to take their chance at their competition market definition argument in the consolidated proceedings. And it goes back to the question as to whether

or not, in substance, what is going on here is an intervention or a consolidation. We have accepted the label of intervention --

THE JUDGE: Okay, let us --

MR DE LA MARE: -- whilst there was, you know, the dispute about costs and appeal rights. There is no difference between an intervention or a consolidation of issues. But we say that what the court should be doing is effectively saying: well, you are a trying out the same issue of market definition, you have raised the same terrain in your competition case, and therefore there should be one resolution of the market definition issues between three of the four common parties -- us, FDC, et cetera -- and that should then provide an authoritative forum with which to resolve the issues arising.

THE JUDGE: That is option 4, isn't it, consolidation? But you lose the trial in October. There is no way that we can have both actions heard together in the period after the summer. You are absolutely right. If you throw everything together and say: right, we will hear both actions in full, then, yes, you are absolutely right, you can ensure that you have an absolutely consistent outcome because you hear both, completely together.

But that's not what is on the agenda now. What we have at the moment is a kind of -- we know that there is a connection, we know we want to deal with it, but what we are proposing, or what is on the menu for imposition is something which falls far short of consolidation.

MR DE LA MARE: With respect, my Lord, until my learned friend's proposals about how they proposed to participate in the proceedings changed -- as they did in January -- there was no material difference between the label of intervention and consolidation. Because what they were proposing, until mid-January,

was that they would be putting up a witness statement and they would be putting in expert evidence. The expert evidence could only be directed at the question of market definition. It could only be intended to flesh out the theory of harm identified in Mr Latham's report.

So what they were proposing was in substance, intervention, consolidation, call it what you will --

THE JUDGE: Of course, Mr de la Mare, if the parties come up with a route where they say: look, we can't hear both actions together because, first of all, they are very big actions and, secondly, one is lagging behind the other, and thirdly, there is only a limited overlap but insofar as that limited overlap is concerned, we would like the court to hear and determine the issues in one go, and cause those issues as determined to bind in the later action, if the parties come to the court with that sort of proposal, then odds on, we will say: absolutely fine. It is a very sensible outcome.

My concern is that that agreement, even if it once may have been on the cards, isn't an agreement that I can enforce on the other parties. Well, you can tell me I am wrong. So we are in a situation which is not a commonly agreed proposal. It is one which -- and I quite understand why you are pressing it because it is ultimately a sensible idea -- but it is only sensible if one has buy-in from the other parties, who have their own rights as to how they run their own cases. That's the problem that I think we have.

MR DE LA MARE: It comes down to the degree of bindingness in those circumstances, doesn't it? Because absent a formal consolidation, or absent an indication by the court that that is, in substance, what is being sought to be achieved, one is left with a situation where there is some form of participation. But to advance what case? That's then, the mystery piece of all of this.

If they are not participating to advance the Latham flagship, small, UK single-source bookmaker theory of harm, what is it that they are intervening to advance by way of case in relation to market definition at all? We don't know what it is that is the case that they wish to advance, if it is not that.

If they wish to turn up and advance some different case -- similar case but different, such as the case being advanced by Sportradar -- how is it that they can then turn up and make a different case to the one they have actually pleaded and gone to the trouble of getting a very detailed, albeit provisional, expert report?

So we are then left in a position of fundamental unfairness because we don't understand what it is that they are going to turn up and say. That is an equal problem. If they are not turning up to argue the Flagship Events argument and they wish to keep that entirely powder dry, at liberty to re-argue that with all the waste and duplication that that is going to create, what is it that they are going to argue in the intervention? That's the mystery to us.

We find it very difficult to understand how it is that they can simultaneously advance the pleaded case that they have advanced in the SCM proceedings, backed by Mr Latham's report, and yet say at the same time to this court that Mr Latham's report shouldn't be before our witness, who's seen it already because it's the -- RBB's, the expert in both proceedings, shouldn't be available to Sportradar, who haven't seen it unless it has been shared with them by SCM, has not been seen by FDC, for FDC and their expert, for Sportradar and their expert to consider it, to see whether it effects how they approach market definition in the Sportradar case.

If one doesn't engage at least on some level with that cutthroat nature of the cases, we are in a very unsatisfactory position, in my submission.

THE JUDGE: I accept that. You see, my thinking is that the most that we can

achieve today, and I think it is pushing at the limits of what is achievable, even doing this, but the most that I think we can achieve is to say to the parties in the later action: look, we want you to be knowing participants in the earlier action, because of the overlap and because of the entirely understandable desire to avoid inconsistent results. So you are going to be in, and there is going to be some kind of read-across between the two claims.

In other words, in contradistinction to the usual case, where the judge comes into court as a clean slate, unaffected by evidence in other matters, that will not be the case in the later action. So, to the extent that points are different in the later action, they need at least to be raised and articulated in the earlier. But I do not think one can say, because one doesn't hear the evidence in both actions at the same time, I don't think one can say that the parties or the court can be bound by what is said in the earlier proceedings.

MR DE LA MARE: Can we test that by reference to the three main potential outcomes on market definition --

THE JUDGE: Sure.

MR DE LA MARE: -- and their feed through to the arguments about abuse and breach of Article 101. The first possible outcome of the market definition exercise is that the case advanced by FDC and my clients is upheld and there is simply one general market for live data into which the FDC data feeds as one of the, if you like, premium, perhaps more valuable estates compared to other sports, but nothing singular about it, so as to create a market of its own. That's the first analysis.

If we prevail in relation to that, my learned friends having been heard at the hearing, should they be entitled to reopen that conclusion? Our answer is no, they shouldn't be, because effectively, any alternative market definition has been

rejected. That's the first scenario.

The second scenario is that my learned friend Ms Kreisberger or Mr Bates, whoever presents the case as the case may be, succeeds in showing that football FDC data and that alone is a unique market, carved out from the general market of LMSD.

If that occurs, that should be binding on all the parties. It means that we will have to live with the consequences of that conclusion in the SCM litigation, where the FDC agreement is one of the three impugned flagship agreements; but it will also follow from that, if Sportradar have succeeded in showing that only FDC data is special, that the arguments in relation to the wider Flagship Events -- ambitious arguments, you might think, in relation to Serie A and basketball -- that they fail, and that's the second conclusion and all the parties should be bound by that.

The third solution is the more difficult one because neither of the active sets of parties are, as we understand it, actively advocating it. We are not advocating it, FDC is not advocating it, and unless I am told by my learned friend Mr Bates, his clients are not advocating a multiple flagship event analysis. So no one is going to be actively advocating that, and the question then arises, what should happen if Sportradar succeed in their market definition and, nevertheless, my learned friend Mr Patton's clients wish to continue arguing for their flagship analysis? We say that this is their opportunity to advance the alternative argument. If they choose not to advance expert evidence or factual witness statements, so be it, they can engage with the market definition, they can make submissions on the reports as filed and say: the correct analysis and all the material is as follows, and if, at the end of the day, the Tribunal, of its own motion or because of things developing in the hot tub

or in cross-examination, comes to the conclusion that there is a wider category of Flagship Events with their own dominance, then the court will arrive at that conclusion. And if you arrive at that conclusion, that will bind everybody.

That seems to us to be the sensible way in which to proceed. But the only area of ambiguity, it seems to me, is in relation to that third category of case. If we win, there can't be any way in which our market definition can be reopened by SCM. That would be an absurdity. That's the basic difficulty. The court has to grapple, with respect -- and that's why this hearing is so very necessary and so useful -- with what the consequences of bindingness actually are, by reference to market definition. It is much easier when you come to the conclusions about whether or not the agreements are void or not, because obviously, that's a pretty binary analysis.

THE JUDGE: You see, here's the thing. I tried, with the then President, the Sainsbury's MIF action back in 2017. We reached a conclusion, in the teeth of, I think, both of arguments, that the market was to be understood as, when operating counterfactually, as comprising bilateral interchange fee agreements. We thought, and we held, that the evidence justified that conclusion.

MR DE LA MARE: Yes.

THE JUDGE: Fast forward eight months to Mr Justice Popplewell --

MR DE LA MARE: Yes.

THE JUDGE: -- where one has --

MR DE LA MARE: Yes.

THE JUDGE: -- different claimants --

MR DE LA MARE: Yes.

THE JUDGE: -- and different evidence, and he looks very carefully at what the CAT decided and says: well, terribly sorry, the evidence is different. I will look at what the CAT has said, but I have to decide this case by reference to the material before me. And he takes a fundamentally different course.

Fast forward another six months and Mr Justice Stephen Phillips does a different set. Now, it is highly unsatisfactory that that should be the case. The Court of Appeal did its best to square the circle by imposing a degree of harmony by essentially saying that the European Commission facts as found, should be the facts -- well, there we are. They solved it.

But I don't think that one can say that the approaches of the three courts at first instance were wrong. I think that all of the courts did their very best to achieve the right outcome and the unfortunate fact is that the outcomes were inconsistent and did no credit to competition law in this jurisdiction by virtue of that fact. So the Court of Appeal says in the “Interchange” / “Visa” cases: look, shunt everything over to the competition Tribunal and we will try and impose a measure of consistency, and that is obviously sensible --

MR DE LA MARE: That, with respect, my Lord, that is exactly where we are at, isn't it, because --

THE JUDGE: That is not where we are at because you are getting that. So far as we can possibly do it, we will have the same Tribunal trying both matters and we will try to have a degree of read-across between the two, so that, hopefully, there will be a degree of consistency.

MR DE LA MARE: Absolutely.

THE JUDGE: But I don't think you can impose such an outcome ex ante. That's where I have concern.

MR DE LA MARE: Let's take this in stages, my Lord. I entirely agree that the

problem we are grappling with is the “Interchange” problem. That's how I opened it to you last time we were here, talking about the subject. Effectively, that is the spectre to be avoided.

THE JUDGE: Yes.

MR DE LA MARE: The way to avoid the “Interchange” problem is through case management and it is through Ashmore-style case management of related cases, in which you give a party in a downstream, look alike case, the opportunity to be heard in the test case, on the proviso that having been heard, they are then bound by the consequence. That's what has informed our approach to the case management throughout. The Sportradar case is the most advanced case, it makes sense for it to be the lead case for all kinds of reasons, not least its timing, and for that reason, the case management is to be applied in the SCM case. The discipline is either accept the market definition exercise that comes out of Sportradar or attend and advance your own alternative case, supported by whatever evidence you need to do so.

That's where we were. And that's what was happening, until in January, they said "we don't want to attend, we don't want to put in evidence, we just want to put in legal submissions and we are not going to rely upon the distinct theory of harm that we have previously articulated".

THE JUDGE: So the question then, is this. I am not going to impose a binding outcome on any party who is not fully represented in the October action. So is the question really, what obligations, in terms of disclosure and witness production, I impose on the non-parties to the October proceedings, rendering them parties, so that we have the ability to deal with market definition in one go?

MR DE LA MARE: As comprehensively as is possible.

THE JUDGE: Yes.

MR DE LA MARE: That is then the question. If anything, once bindingness is reduced, as my Lord is approaching it, then the need for the material to filter into that hearing increases.

Our demands, our requests, in terms of disclosure, have been -- despite how they have been presented -- modest. They have been driven by, first of all, my Lord's approach to priority disclosure in the Sportradar proceedings, those categories of documents that you said should be produced immediately because of their burning centrality and obviousness to market definition, and they have been informed by the process in which we settled upon LOIDs in both cases and the issues identified by the experts, RBB and Oxera and others, identifying what they need for their market definition exercise, and they have been driven by the theory of case that has been identified in Mr Latham's report, and then lastly, as you have seen from RBB's letter, they have been driven by the particular fact that there would be, compared to other market participants, a relative lack of transparency about SCM's operation. That is because, putting it bluntly, SCM does not seem to have a great deal of high profile DRAs at all. It has DRAs in relation to Armenian football and eastern European football, but in terms of the other, sort of more core estates of tennis and football, what it has is very much at the fringes in areas like esports.

Yet we know it is making an offering in the areas affected by this litigation, not least because it is part of Sportradar's pleaded case that BetConstruct is a participant in relation to what they call LLMD. I think it is Part 20 of the CAT claim which lists them as a market participant. And we know that insofar as they are participating in the core sports that are at issue in Sportradar which

are football, volleyball and basketball, they must be either be doing so by dint of off-tubing or scraping. And we think that is probably the source of the sensitivity about the provision of the disclosure that we are seeking because, ultimately, what we are seeking will require them to reveal the true contours of their operation, and whether it is substantially scraping and, therefore, potentially infringing or whether it is substantially off-tube.

Of course, it is off-tube, let's say they have a very large off tube operation, that is of direct relevance to the issues for market definition, because as you know, one of the core issues between us and Sportradar is about the extent of the substitutability of off-tube products and the extent to which that operates to constrain any market power that might arise from official data.

So if they have a big off-tube operation, that in itself is really germane information for the purposes of the market definition that you have to do in the Sportradar case.

So that's --

THE JUDGE: But that is an awful lot of disclosure, when we are beyond the middle of February, with an action that is starting after the summer, where the parties to that action are adjusting the timetable so that, effectively, we are in not quite the last chance saloon to ensure the trial runs but we are running quite close to a risk of having to work very hard to avoid an adjournment. So you are talking about loading into a trial which is in itself, I would think, quite fragilely balanced, a great deal of work, in order to achieve an objective which, to be clear, I entirely respect. It is the combination of wanting a trial in October and wanting the trial to embrace the market definition issues which is the inconsistency or difficulty that I am not sure how we resolve in this case.

If we had the two actions running in parallel, with both of them operating in

accordance with the same procedural timetable, then, you know, not a problem. We would simply say we will have a couple of weeks devoted to market definition in both actions. We will sort that out, and then the uncommon issues can be heard separately. One will either have a single publication of two judgments at a later date, or, if appropriate, separate judgments at separate dates, but one can handle that. The problem is, you have the sequential sets of actions, where one is way behind the other and it seems to me that it is too late to achieve the kind of consolidation of this issue that, to be clear, I think is sensible but difficult. That's why I am raising the adjournment of October, because of the thing that --

MR DE LA MARE: Forgive me these remarks, my Lord.

THE JUDGE: No, no, not at all.

MR DE LA MARE: The first is nothing has changed in our position. We have been raising this concern since the minute the SCM proceedings arose and we identified from the get-go, the issue of market definition as a core area of overlap, back before Mr Justice Roth, before my Lord was even involved in the case management of this case. Nothing has changed with our concerns.

THE JUDGE: No.

MR DE LA MARE: We have been yelling Cassandra-like about this problem for some time.

THE JUDGE: Mr de la Mare, when I came into this action and heard you, the first thing I did when I left court was I --

MR DE LA MARE: You took over that case.

THE JUDGE: I spoke to the Chancellor and said: you must docket SCM to me.

MR DE LA MARE: Absolutely.

THE JUDGE: At the end of the day, that's all I did.

MR DE LA MARE: We understand that. The second point we make is that we have been seeking wider and refined categories of disclosure for some considerable time, not least since our letter of 3 December.

THE JUDGE: Yes.

MR DE LA MARE: And there has been no substantive engagement with those requests, in terms of the logistical demands and what is or is not possible, whether or not a set or a subset of that data is or is not providable.

So we have had, basically, blank rebuffing of our requests. It has not been "we can provide you that in the time period but not this. This is disproportionate, this is achievable", it is blanket rejection of any notion that any disclosure at all should be provided.

THE JUDGE: Sure.

MR DE LA MARE: The third point is if you go through each of the categories in Annex A of our draft order, you will immediately see the different considerations as to proportionality apply. So let's start with the easiest category, Mr Latham's report.

Now, I think there is terrain for debate as to whether or not any order is required in relation to Mr Latham's report at all, because it is a document already in our hands and disclosable as such to the other parties in the Sportradar litigation because of its relevance. But if that is not correct -- and I don't want to have to argue it out because we need clarity one way or the other -- it is a document that must be provided, not least because it has been seen by RBB, who are, for entirely obvious, necessary and understandable reasons, experts in both proceedings, whose input we relied upon in formulating our reply and defence to counterclaim, to the defence and counterclaim formulated by my learned friends, on the strength of Mr Latham's report.

If RBB have seen it, they must be entitled to engage with the theory of harm that it identifies, however provisionally. Of course, everyone understands that Mr Latham's report is provisional and was doing the best he could on the status of the information then available to him. If RBB can see it, it must follow that Sportradar and FDC can also see that report, to make of it whatever they wish to make.

So that's easily achieved. There is no issue of proportionality. There is no issue of unfairness. That is, if you like, the alternative theory of harm that we say should be factored into market definition in some fashion or other. So that is request 4 in Annex A. That is the first part of request 4. The order, if my Lord wants to pull it up --

THE JUDGE: I have it printed out, yes.

MR DE LA MARE: It is at page 9.27 of the bundle.

THE JUDGE: Thank you.

MR DE LA MARE: And Annex A is 9.30. If you look at point 4, the first point is the expert report itself. Of course, that can be disclosed and should be disclosed and should be available to all the parties in the Sportradar litigation.

Then there are the documents, data and information that are the instructions that underlie it. And there can't be any logistical problems in providing that material. It must have been identified and provided already, and again, it will come with the proviso that it is provisional and subject to full data, et cetera, but all of that can and should be readily, easily providable.

So there is no timing or proportionality objection in relation to either of those two categories of information. Then we have categories one and two, and this is really asking -- and we formulate it by reference to data because that's the approach that my Lord took in the Sportradar proceedings, expert-led

disclosure, with the experts saying: what is it that they actually need to know for the purposes of market definition? Effectively, requests 1 and 2 ask: what is your content and how have you got it?

So: have you got DRAs, are you off-tubing, are you scraping? Effectively. That's what is being asked.

Now we can have a debate about the granularity of that request, but there can't be any kind of fundamental impossibility in providing that information, whether it is by reference to SCM's general estate, or whether it is by reference to the three key sports of basketball, football and volleyball. If the time period is said to be too long -- May 2015, which is the time period we have been working to in the Sportradar litigation, then we can have a debate about what time period would be achievable. But some basic outline of the shape of this competitor and what its information holdings are, for the purposes of doing a market definition that then looks at it as well as Sportradar and Betgenius, two of the principal competitors on the market, is obviously required to do a more authoritative and compelling market definition exercise. Then 3 simply says: how have you sourced the data?

Then we can have a discussion about refining the time period or the sports in question, but it can't be impossible in the time. And I go back to the point, we are not seeking to imperil the Sportradar proceedings. We accept as a given that this data has to be provided by a date that is not going to imperil the proceedings because we are of a piece with FDC and Sportradar that the October date has to stick and that trial has to be effective. So if my submissions run up against that rock, so be it, we accept that that is the rock and that's the rock that my Lord has identified as well.

THE JUDGE: In that case, I think -- I don't want to cut you short, but I think I need to

hear from Mr Patton about the feasibility.

You see, I quite accept that your clients have raised the consolidation issue, if I can call it that, from the get-go. That's understood. And the court has, to the extent it can, reacted in a way to make that possible. But at the end of the day, you can't force a stranger to litigation to do what may or may not be sensible, without ordering them to do so. The fact is there is no order against SCM to do anything in these proceedings.

So the question, as I see it today, is: do I make that order? And that, I am quite prepared to debate, but I anticipate that Mr Patton will have quite a lot to say about the steps that need to be taken in order for his clients fairly to participate in a trial that will be, to a limited market definition extent, consolidated.

MR DE LA MARE: I will sit down.

THE JUDGE: I think you will want to reply --

MR DE LA MARE: I am sure I will.

THE JUDGE: -- to what Mr Patton says, because I anticipate Mr Patton is going to say that of course I have the jurisdiction to make that order, to bring in SCM, but -- I may be wrong in my prediction, but I suspect Mr Patton will say that it can't be done in the time between now and October in a manner that is fair to his clients.

If I am wrong about that, and it can be done, then we are off to the races. But that's, I think, the matter for debate.

MR DE LA MARE: Yes. It can't be done will be the answer in relation to categories 1 to 3. In relation to category 4, Mr Latham's report and the instructions, the answer is it is going to be hugely unfair because it is a provisional report and ... but that then leads directly into the other question I do invite you to put to

Mr Patton: how is it we are to know what the case is he actually wishes to put in the case, if it is not the case contained in the pleadings and Mr Latham's report?

THE JUDGE: Sure. But the thing is, a non-party is entitled, until compelled by the court, to maintain a degree of -- how can I call it -- creative ambiguity about what its position is, until the issue is forced by the court.

Now it may be that SCM's position is, you know, "we are taking our time, we are in proceedings that are going pretty slowly, we have heard what Betgenius have said about consolidation and all that, but frankly, we don't give a toss and we have not done anything".

MR DE LA MARE: Two points I say to that, my Lord. First point is you do have jurisdiction to make any order you like in the context of the SCM proceedings. You can order early disclosure --

THE JUDGE: I can.

MR DE LA MARE: -- in the SCM proceedings, and that is the appropriate response.

THE JUDGE: Mr de la Mare, I don't think we have any problem about jurisdiction.

MR DE LA MARE: The second point I make is this, my Lord. There is a strong element of cake and eat it about my learned friend's submissions because at the same time as saying they don't want, effectively, anything substantive to be committed to in their participation, they want a full-blown stay of the competition issues that arise in the SCM proceedings. It can't be both. Either there is some form of case management to ensure that duplication is avoided or there isn't. In which case, we should be getting on with trying the competition issues in the SCM case ASAP.

THE JUDGE: I think the benefit of this hearing is that you will get orders in both actions today. What those orders will be, I think is an extremely difficult

question. But, yes, this particular boil has to be lanced today.

MR DE LA MARE: It has. I think if nothing else, we can all agree that what we need is clarity on that front. I am grateful, my Lord.

THE JUDGE: Mr de la Mare, thank you very much.

Mr Patton.

Submissions by MR PATTON

MR PATTON: I am grateful, my Lord. I think your Lordship has anticipated many of the points that I will be making but I will seek to make them anyway, if only to give your Lordship a chance to debate them with --

THE JUDGE: No indeed, that I think is very important.

MR PATTON: May I take a step back and explain where we are coming from in relation to this issue? In a nutshell, we recognise that there is a degree of overlap between the issues in the Sportradar case and in the SCM case and that something ought to be done to address that. And we particularly recognise the point that fell from your Lordship earlier, that in the real world, your Lordship is going to be sitting in the Tribunal in the Sportradar case and is also going to be deciding, adjudicating upon the issues in the SCM case in due course and you will not be starting from a clean slate. That's a point we are very conscious of.

What that means is that even if we were not bound in any way formally by the outcome of the Sportradar case, we would be starting the trial in the SCM case conscious that your Lordship has already been considering related issues, conscious your Lordship is unlikely to reconsider those issues -- or certainly won't be able to reconsider them as if they were entirely new issues -- and that, therefore, your Lordship's reasoning and conclusions and the Tribunal's reasoning and conclusions in the Sportradar case will inevitably

have to be factored into the evidence and the submissions that are advanced in the SCM case. That is true not just in relation to the areas of strict overlap. It is obvious that your approach in the Sportradar case is going to inform all of the competition issues in the SCM case, and that will be true for us, as it is for the other parties.

THE JUDGE: Mr Patton, that is quite an important point that you have just made. Because there would be other cases -- and I am going back, really, to the Lloyd's litigation -- where parties explicitly made the point that they didn't want the same judge dealing with the same matters, because they wanted to enter the courtroom with a clean slate, as it were, so as to persuade the judge of the merits of their position, unencumbered by what had been decided previously.

If nothing else, I do think it is important that we get that read-across built into an understanding of all the parties. Because it does seem to me that it is quite important for the sake of due process in both actions that the parties understand, even if it is not a formal consolidation, that there is or is not going to be a read-across, so that we can ensure if that is going to be the case, that there is appropriate involvement of, as it were, the non-parties to the October action in that action, so that they can at least flag up where there are differences between the two.

So, again, I am not agnostic, I am in favour of the sort of read-across that you are articulating, but it isn't the only approach that one could take. One could take the MIF approach and have completely separate actions with the unfortunate consequence that there is an inconsistency of outcome.

Now, I certainly want to avoid that, but at the same time, I would not want to lay this court open to the suggestion that it had behaved improperly, actually, in the

second action, by taking into account that which had been decided in the earlier action. So it does seem to me extremely important that we embody in any order that emerges today what we consider the relationship between these two matters to be. What I am really thinking is one can either say it is consolidation and one decides the issues in one go in the same place; the other extreme one has is they are completely separate and one doesn't, in which case, I probably ought to say I would not be trying the second action; or one has -- and this is the definitional difficulty -- something in between, which is what I call a read-across but it would be to say something along the lines of "The judge in the second action will take into account and be permitted to take into account, the evidence and thinking of the earlier action. Not that they would be binding but that they would be taken into account".

The reason I raise it now is because I don't want to be extracting a concession from you. If you think in your client's best interests, that disengagement is the right course, then I think I must hear you on that. Because the desire for consistency, it is an entirely laudable one and one that, to be clear, I am keen on, but not at the price of an unfair trial in the second action.

MR PATTON: Yes. My Lord, may I just take instructions?

THE JUDGE: Of course.

MR PATTON: My Lord, we respectfully agree with the approach that your Lordship has articulated, the middle way, if I can put it like that. The only thing I want to make sure your Lordship is conscious of, as you will know from your own judgment in December, the other case, the SCM case, has not yet been fully constituted, and that's because my learned friend Mr de la Mare's clients have not yet made their application to join the parties which your Lordship has held are essential parties to that claim.

What that means is that as at today's date, it is not possible to be certain that all of the parties to the SCM case will take that position. That's the only reservation I would want to make. Obviously there is a question of fairness if some of those parties are going to take a different position on this issue.

THE JUDGE: That is an entirely fair and proper point. It actually raises a larger question, which I am sure you will be coming to, but just to give you my take on it: there are two problems, as I see it, in going further. Mr de la Mare, I think, will take the read-across, but it is not what he wants. He wants something much more than that. He wants what I will call consolidation.

The problems with consolidation are, I think, two-fold. One is, how far can I shoehorn your clients into an October trial, to ensure that all of the material is present before the court, such that all the parties can argue the common issues.

The other point, though, is, is the state of the second action such that I can properly do that? I don't know how far the points that you have just made -- namely, can I impose read-across on non-parties -- well, that is the problem in spades. If I say consolidation, can I impose consolidation on persons who are not actually, as yet, in the second action?

Now, read-across works to an extent, because I can say "I will read-across", and then if things go wrong and the non-parties who become parties say "look, you can't, shouldn't to this", well it is pretty easy for me to change my mind. It would be unfortunate, but I can quite easily say, "I will not try the second action, someone else will." But consolidation is a rather different ball game because I will be committing the court and the parties to a process which is intended to be binding in both sets of proceedings.

MR PATTON: Yes.

THE JUDGE: I raise these really for Mr de la Mare to articulate, but I would be very keen for you to flesh them out, so that I have a sense of the problems that exist in relation to a more extreme course than just read-across.

MR PATTON: Yes. I respectfully agree with the concerns that your Lordship has identified.

So far as read-across is concerned, your Lordship could take the view that you could indicate today that your intention is to read-across. That is obviously subject to the right of those who have not yet been joined to make representations about whether that is appropriate in due course. We would respectfully suggest that it is important that be revisited -- obviously, only if they take a different view from us -- because what would be, I think, unmanageable for your Lordship (inaudible), would be to be sitting in the SCM case, in the later case and being permitted to read-across for the purposes of some parties but not for others. That would be beyond any human being to imagine. So maybe the only solution at that stage would be for your Lordship to withdraw from the case.

In relation to consolidation, we respectfully agree. Mr de la Mare, although he's floated consolidation orally, it is not actually the position he's been taking up to now. It is not the position he took in his skeleton. And consolidation is not possible for the reason your Lordship gives. One could only make an order that the cases be heard, tried together, even in relation to some issues, once both actions are, at the very least, fully and properly constituted. What your Lordship held in December is that our action is not fully constituted.

The latest indication -- we had a letter on Monday from my learned friend's solicitors Fieldfisher in the SCM case, and they say that their hope is to issue an application for joinder on 25 February, but they have not committed to that.

And then there is a question as to when that will be heard, and they suggest some time in mid to late March.

But obviously, we have not seen that application, we have not been given a draft. We don't actually know who all the parties are who are intended to be joined and we don't know whether they consent or not to be joined, whether they will be consenting or whether they will be opposing joinder. So the position as of today's date is your Lordship should assume that even the question as to who the parties are in the SCM action will be unresolved until at least, say, the end of March.

Then, of course, one will need to have pleadings from the new parties, insofar as they are going to put forward a case. They will need some time to do that because for the most part, they will be strangers to the action. The pleadings will possibly take some weeks or possibly months before they are closed. Your Lordship can't sensibly make an order for a trial before you know what the issues are. Of course, one knows what the issues on market definition are that have been raised by the existing parties in our action, but one can't know what further issues might be raised by the new parties.

So, my Lord, we would suggest that for those reasons, consolidation simply is not on the table. If the October trial in the Sportradar case is going to be held, and your Lordship has indicated on a number of occasions the importance of that trial being held, it is obviously not particularly a matter for us, but I understand that my learned friends, who appear for the other parties in the Sportradar case, see that as a very high priority and something that shouldn't be jeopardised. So we respectfully suggest that consolidation is simply not a realistic option.

So far as my learned friend Mr de la Mare has a grievance about that, his clients are

very significantly to blame because it is they who failed in the first instance to join the parties and it is they who, since your Lordship's judgment in December, seem to have made very little progress in actually joining the parties. Certainly they have not brought that to the state of an application as at today's date. So Mr de la Mare does not have any legitimate grievance about that, that is really as a result of his own client's conduct.

So, my Lord, we would suggest consolidation is not an option. Instead, the option that we have put forward as a way of addressing the -- the genuine issue that exists about the overlap is that we should intervene in the SCM case. We have made clear, as your Lordship knows, that we are not seeking to put in factual or expert evidence. We are simply seeking the opportunity to make non-duplicative submissions before the Tribunal reaches its decision.

THE JUDGE: Just to be clear, the purpose of that intervention is to make, if I can call it this, the read-across easier.

MR PATTON: Yes.

THE JUDGE: In other words, what you would be able to do is anticipate -- well, you might be able to anticipate differences between the two cases, so that even if there isn't evidence, the court could be alive to these differences, and to the extent, try to factor them into its thinking, if only to limit what is said in the earlier action, so as to leave matters live later.

MR PATTON: With respect, my Lord, that is exactly the point I was wanting to make to your Lordship.

My learned friend Mr de la Mare seems to proceed on the basis that if there is an intervention, then that has the effect of importing our pleaded case into the Sportradar case. That is obviously not right. That would be the effect of a concurrent trial, it's not the effect of an intervention. The issues before the

Tribunal in the Sportradar case will remain the issues pleaded in that case and we will not be free to make submissions on issues that are not before the Tribunal in that case, but what we will be able to do is to warn the Tribunal or alert the Tribunal to potential areas of overlap.

As your Lordship said, that might be to make a positive submission, non-duplicative, in support of something which, for example, that Sportradar is submitting. It may be on a point of law that the Tribunal is grappling with. But it might also be, as your Lordship rightly says, to make sure that the Tribunal does not go too far in what it says, that the Tribunal does not express itself too broadly because it might be trespassing into issues that it doesn't need to decide for the purposes of the Sportradar case but that it may need to decide in the SCM case and that the Tribunal would prefer to make that decision on the basis of a proper plea, evidence that directly addresses it and so on.

So my learned friend forensically says: what is it we would be saying, unless we are going to be advancing our own case? That is a good example that your Lordship puts to me. We might be saying: don't decide that point or at least hesitate before you decide that point because that may prejudge an issue that you would be better off making or making on a more informed basis when it comes to the SCM case.

My Lord, we say that the limited solution that we propose has a number of real advantages. First, it won't impact on the timetable in the Sportradar case if it takes the form that we advocate. That will be able to go ahead in October. It has been suggested it might add one day to the trial duration, so it will not have a significant impact for the parties of costs, for example, of that trial. If it were a longer extension to the trial duration, that would obviously have a cost impact.

Secondly, it is likely to narrow the issues in the SCM case, because we will have an opportunity to direct the Tribunal in the way that I have described. As I say, we have agreed to be bound in certain respects by the outcome as has Genius, so that will narrow the issues.

Thirdly, we suggest that this form of intervention will minimise costs. Both the costs that we will incur because we will simply be making non-duplicative submissions and the costs that the parties to the Sportradar case will be incurring because they will review our non-duplicative submissions but that will be limited --

THE JUDGE: How does binding to the outcome work? I mean, it seems to me that that goes too far. I mean, for all the reasons we have discussed, you are saying we don't have a fully constituted second action.

MR PATTON: Yes.

THE JUDGE: If I can't, on your submission, properly consolidate, how can I make an order as to bindingness of even limited issues in the second action? I suppose I could make an asymmetric anticipatory order that certain parties are bound by certain matters, but it seems to me that is getting quite messy.

MR PATTON: Yes.

THE JUDGE: I have no problem in there being an indication that the read-across might be quite a strong one --

MR PATTON: Yes.

THE JUDGE: -- but I am very far from being in a position to decide anything substantive in any of these matters. I would hesitate even to say there will be a strong read-across.

MR PATTON: On reflection, I think your Lordship is right about that. Given the point I made earlier, that your Lordship -- when you come to decide our case --

can't possibly be performing a read-across for some parties as between inter se, but while putting it all out of your mind as between other parties. I think the logic of that does drive one to the conclusion that the same must be true a fortiori in relation to binding effect, because then you would be having to pick through the different arguments as between different parties and deciding in relation to some they are bound and in relation to others, that they are not bound. That may be beyond human understanding. I think on reflection, your Lordship is right that, in fact, read-across, with your Lordship obviously having to exercise judgment as to how strong that read-across should be, in the light of what you heard and considered in the Sportradar case and in the light of what you may hear and consider in the SCM case, that ought to be a relatively flexible concept.

THE JUDGE: Exactly. What I am thinking is let's suppose I make a series of decisions on market definition in the first action --

MR PATTON: Yes.

THE JUDGE: -- and I take the view that having heard the argument, and having heard argument in the second action, where you are saying: no, you have it completely wrong, the market definition should be totally different, I say "terribly sorry, I have heard you, I heard the first action, I am actually going to cut and paste the paragraphs in my first judgment into my second judgment and that's that. For the reasons I gave in that earlier judgment, this is the result in the second". I don't want any party -- and I appreciate there are non-parties who would have to be committed to this -- I would not want your clients to be able to say to the Court of Appeal, "The judge acted unfairly, in some way improperly, by cutting and pasting the judgment in the earlier matter". That's where I think you are going to be committed if we go down the

read-across route.

MR PATTON: Yes.

THE JUDGE: As I say, read-across is something one can disengage with later on. It is an order I can quite easily unmake later on. But I want there to be no doubt about it being a powerful -- or potentially powerful -- but very flexible tool.

MR PATTON: Yes.

THE JUDGE: If Mr de la Mare is right, and there is essentially the same question but in different guises in the two proceedings, then the read-across ought to be extremely strong. If that is the route we go down, I think your clients should be under no illusions that that is how I see it, and that's the reason for the intervention.

What I am unwilling to do is to go the whole hog and say I am going to pre-commit to a specific outcome in case one into case two, because I don't know what I am trying, I don't know what submissions you are going to be making, and frankly, I don't know how the evidence will differ between the two actions.

To put another marker down, I would take a pretty dim view of rabbits being pulled out of the hat in the second action, when they could have been drawn to my attention in the first. But I can't, I think, unless one is consolidating, go further than making that indication. So it is a very dangerous halfway house that we are articulating. The reason I find this hearing -- and I am sort of extracting points on the record for the future -- is because it is a tricky area. The reason I am willing to engage in it is because I don't want the kind of *Mastercard MIF* disaster that we had three or four years ago. And that's why we are debating this somewhat unusual course of action. But I do think it is important that I put my cards on the table so that the parties can tell me that they are, or not,

willing to buy into that course of action. Quite how the order reads if I make such an order is going to be an interesting exercise in drafting, but I think the starting point is to be absolutely clear about what it is that we are engineering here, if we are not going for either consolidation or complete disengagement.

MR PATTON: Yes.

I entirely understand your Lordship's concern to avoid the “Interchange” outcome situation and I respectfully agree with what your Lordship has put to me as to read-across. My only caveat being -- I know your Lordship was not expressing any view about this -- is to how strong it will end up being, in the light of what Mr de la Mare says. Because Mr de la Mare actually says different things at different times about how similar or different the issues are. If you were to do the exercise which I did of comparing his skeleton in November to his skeleton today, there is quite a lot of copy and pasting but there's a very different emphasis on quite how similar or different they are but no doubt for forensic reasons. That goes not to the principle but to the application of the principle.

THE JUDGE: No, indeed.

MR PATTON: And that can be debated in due course.

THE JUDGE: To be clear, I have obviously no final view about the similarity. But I think we are proceeding on the basis, if these were utterly unrelated matters, we would not be having this debate. So I think we proceed on the basis that Mr de la Mare is right, that there are synergies between the two, that one ought, therefore, to look -- if, of course, those synergies don't exist, well, then, my problems are over. I don't need to worry.

It is if there are that the parties need to know that there may well be substantial transplantation of material going across into the second action in

circumstances which, but for this hearing, could well be regarded as entirely inappropriate and unfair. That's my concern.

MR PATTON: Yes. My Lord, we understand and we agree. I am grateful.

My Lord, that may take me to the question of disclosure because we have essentially discussed the impact that the decision in Sportradar will have in our case.

In relation to the request for disclosure, it is not clear on what legal basis your Lordship is being invited to order disclosure. I know your Lordship says there is no jurisdictional problem. It is true that one way or another, if you were determined to order disclosure against us, your Lordship could no doubt fasten upon some rule. None has actually been identified in the skeleton or orally by my learned friend Mr de la Mare, but one can perhaps assume that your Lordship can order disclosure.

The question is, what would be the grounds? What would be -- not jurisdiction in a narrow sense but in the sense of what would be the reason why you would be ordering disclosure, having regard to the very limited nature of the intervention that we are seeking to make? We are not seeking to adduce factual or expert evidence --

THE JUDGE: Mr Patton, let me make clear what my thinking is on this. It seems to me that looking at the three options before me, if we disengage, obviously, no order would be appropriate. If we consolidate, then absolutely an order will be made, and that is where I would absolutely be making an order for disclosure, as well as all kinds of other orders, to ensure incorporation of the issues in the October trial.

If one goes down the halfway house, the read-across, then I am quite sure, if I exercise my imagination, I could find some jurisdictional basis for doing it, but I would not be minded to exercise that jurisdiction, if it existed. It seems to

me that the whole point of the read-across is that it operates in a relatively informal way. So I would want SCM to think about what material could be disclosed, so as to ensure that synergies between the two actions operate. As I say, I would take a singularly dim view of rabbits being pulled out of hats between trial 1 and trial 2. But I don't think beyond giving that indication, an order for disclosure is appropriate. Because what we are doing is creating a kind of halfway house which isn't doing what it says on the packet.

I mean, what the halfway house says on the packet is "I am going to save time and try to create consistency between the two actions without formally linking them." If you want formal linkage, which of course Mr de la Mare does, then we are in consolidation territory and that's what I would want to be ordering. Otherwise we just end up with a mess, where no one knows what it is they are actually doing in the action. And that, I think, is -- as I say, that is entirely without criticism. The problem we have at the moment, no one really knows what it is that we are trying to do with these two linked trials.

If nothing else, I want everyone to be absolutely clear about what is going on from tomorrow onwards.

MR PATTON: Yes. Well I am very grateful for the indication. My Lord, I have quite lengthy submissions I would have been making on the question of disclosure if you were minded to order it, but I don't want to take up time unnecessarily.

THE JUDGE: I suppose I don't want to encourage you to be long, unless it is appropriate. I have your point that the state of action 2 is such that consolidation is inappropriate.

MR PATTON: Yes.

THE JUDGE: Not fully, but I do think I would also need your bullet points as to why, even if action 2 was fully constituted, I could not order consolidation in the

timetable that is envisaged to October, because there would simply be too much to do. I say that because I want to give Mr de la Mare a chance to push back on that.

So it may be that you will tell me that the disclosure, in order to consolidate, is sufficiently voluminous and sufficiently difficult that there just is not the time, but really what I would be assisted by, I think, is submissions which would go along the lines of "if I were minded to consolidate", leaving on one side the --

MR PATTON: Joinder --

THE JUDGE: The joinder of parties in action 2. If I were minded to consolidate, is an adjournment inevitable?

MR PATTON: The answer to that is clearly yes. I am not sure that Mr de la Mare actually dissents from that proposition. But certainly I expect that my learned friends who appear for the other parties, for Sportradar and FDC, will certainly take that view.

It's important to be clear that even the disclosure which Mr de la Mare is seeking from your Lordship today, which he says is limited which we obviously don't agree, that is not the disclosure, as I understand it, that he would be seeking, if there were to be consolidation, that is just a subset of the disclosure. So what one would be looking at in the context of consolidation is actually a much more significant exercise than even this. I will come on to say why we say even this is going to be too much.

Obviously, if one were going to have consolidation -- so the first thing would be that we would have to identify what disclosure exercise was to take place, of which this is said to be a subset.

There would need to be a timetable for expert evidence and factual evidence from us, if there was going to be consolidation. As your Lordship put it, the

timetable on the Sportradar case currently appears to be one that is relatively fragile. We would suggest that tipping in large quantities of data and documents from us, factual witness statements in an unknown number -- frankly, I have no idea of what the number of factual witness statements would be from us, into that case -- adding also a further expert, that is going to be completely unbalancing to the Sportradar case.

Just on disclosure, your Honour has, with respect, rightly espoused an expert layered approach to disclosure in the Sportradar case and we will be advocating the same approach in the SCM case. The very first thing that one would have to consider before reaching the question of what disclosure we ought to be giving, is for there to be discussions between the experts in our case which obviously have not happened. So that is a yet further stage which one would have to factor into the timetable before you reach disclosure, witness statements and expert evidence. It simply could not be done if one was starting today.

My narrower submission, my submissions more closely directed to what Mr de la Mare is actually seeking today is that even that exercise is not one that could possibly be done before the October exercise.

My Lord, just before I reach that, can I make a few bullet points, as your Lordship put it, as to why this is not really the right approach, in principle anyway? The first thing is that what is really being sought here, the rationale for the disclosure request appears to be that it ought to be a precondition for our intervention. We would suggest that our intervention is really designed to meet a case management need, to meet the problem that we have been discussing of the overlap. It is not the sort of situation where we are intervening purely in our own interests, causing difficulties for the main parties in the existing matter,

and where some precondition has to be imposed by way of a safeguard. It is simply not that situation at all.

Indeed, the impetus for intervention has come, as they themselves say, principally from the Genius parties. So this isn't a case where we are intervening in our own interest and your Lordship should be extracting some quid pro quo.

Second of all, we have made the point, as your Lordship knows, that disclosure from an intervener is unusual. We have not found a case in which it has been required. Mr de la Mare has not cited any case in which it has been required. We would suggest there is good reason to require it in this case. It really goes back to the point that if it's intervention, not consolidation, the issues to be decided are going to be the issues in the Sportradar case, not the issues in the SCM case and, therefore, why should disclosure be required?

Thirdly, this would be a situation -- if all Mr de la Mare is seeking is disclosure, as opposed to factual and expert evidence which I say is even more impossible to countenance, then what would be achieved is disclosure from SCM without any witness or without any expert to explain that disclosure or data, or to give it context. One often has the experience in a trial that a document does not simply make sense looked at in isolation, what one needs is the explanation from the witness or sometimes from the expert which puts it in context and enables the Tribunal to make sense of it.

That, at least on Mr de la Mare's primary proposal, is not going to happen on any view and, therefore, one asks: what is the point of requiring disclosure if there is not going to be factual and expert evidence? We would suggest that that gives rise to real dangers that you are going to have a document or a piece of data before you but without any evidence to explain it.

My Lord, the fourth point which I think possibly comes closest to addressing the point

your Lordship has just been putting to me is that this is not a case -- as we understand the procedure for disclosure in the Sportradar case, it was an expert-led process. First of all, your Lordship ordered certain contracts to be produced but that is not what is being sought here. There was then an expert-led process which resulted in the production of a disclosure schedule which your Lordship approved. We have not seen the disclosure schedule but we have seen your Lordship's order which refers to it. The order indicates that that was to identify not just data within the possession of the parties to the Sportradar case, but also data in the public domain or data to be sought from other sources. So that would include third party disclosure.

And that was all to be factored into the disclosure schedule. Now although we have not seen it, we infer that none of the experts suggested at the time of producing that schedule, that data was needed from SCM in order to fairly resolve the issues in the Sportradar case. I don't know that for a fact, but it has not been suggested that that was something that they raised. Mr Bates -- my learned friend Mr Bates -- in his skeleton, makes clear that this proposal has been prepared unilaterally by the Genius solicitors, possibly in conjunction with their experts, but without input from any of the other experts in the Sportradar case.

My learned friend Mr Edwards, in his skeleton, says that the disclosure sought from us is certainly not necessary for the purposes of the Sportradar case. That's, I think, paragraph 24 of his skeleton.

It is in paragraph 25 of his skeleton.

My Lord, if the experts in the Sportradar case did not think, when they finalised the disclosure schedule, that they needed any information from SCM for the purposes of preparing their reports, nothing has actually changed since then

that would require one to take a different view, or that would justify suggesting that this material, which was not considered to be relevant or important at the time of the disclosure schedule, is now relevant or important.

My Lord, I don't know if your Lordship has seen the letter that came from Mr de la Mare's experts, RBB? I don't think it is in the electronic bundle, but it was exhibited to his skeleton.

THE JUDGE: I don't think I have seen that. At least I don't have it before me now, if it is not in the bundles.

MR PATTON: My learned friend has a copy.

THE JUDGE: I am grateful. I received the paper bundles last night -- I probably have read it, because I read the exhibits to the skeleton, but I will have a look and refresh my memory. **(Handed)**.

Let me just re-read it.

(Pause).

Yes, I see.

MR PATTON: My Lord, there is no suggestion that this is the product of any discussions with the other experts in the Sportradar case. It seems to be a purely unilateral view that they have taken, in conjunction with their solicitors. It deals with all the categories on a rolled up basis without unpicking why it is said that each of the categories would be important or helpful. And it is pretty conclusory in what it says. It doesn't say, for example: this is the equivalent data that we have already received from the parties in the Sportradar case. This is how that data has been deployed as part of the analysis, but the analysis is incomplete and there is incremental benefit to be obtained if data is provided by the SCM parties.

There is no analysis of that kind. So we would suggest it doesn't really take one very

much further.

My learned friend actually hinted orally that the real interest they have in seeing something which marries up the competitions or events with the licences agreement is to see whether there has been infringing activity. He mentioned that point orally. Now there would be a completely collateral part in seeking this disclosure for the purposes of the competition case and obviously could not justify it.

My Lord, the position is even more stark in relation to Mr Latham's expert report and the materials relied on in it. Your Lordship has not seen that report, but you can take it from me that that was prepared in response to an application by Mr de la Mare to strike out the original competition plea in the defence, and in response to the strike out application, he prepared a report which said that there was a realistic argument to be made in relation to the competition issues.

So there was a report prepared for limited interlocutory purposes at a very early stage in the proceedings, not based on the kind of analysis that the experts in the Sportradar case would have been conducting by references to the disclosure in the Sportradar case.

So we simply don't understand how that interlocutory report could be relevant at all to the Sportradar case. The trial in the Sportradar case is going to be conducted on the basis of the disclosure, the factual evidence and the full expert reports. There will be expert reports, as I understand it, from RBB, from Oxera and from Compass Lexecon, acting on behalf of the different parties. Why does one need an interlocutory expert report served for a very limited purpose in that context?

My learned friend said orally they have already got it and they have already looked at

it. But he accepts that the report was received -- certainly his solicitors have accepted -- subject to the undertaking against collateral use in CPR31.22. So the position is that they are not free to use that for the purposes of the Sportradar proceedings at the moment. And there is no reason why they should need to use it, for the reasons I have given.

As you rightly anticipated, we do say that there is something very unfair about requiring the disclosure of an expert report, produced in the circumstances I have described. In the situation where that expert is not going to be producing a full report in the Sportradar case, not going to be attending the joint meetings, not going to be giving oral evidence before the Tribunal. It is not fair that use should be made of that limited interlocutory report in that context.

So, my Lord, we say that when you look at how the disclosure has been identified by the parties in the Sportradar case to date, no one thought that this material was needed -- no one -- until the suggestion was raised by Genius in the context of our intervention.

Finally, coming on most directly to the point that your Lordship has been putting to me, we do say that this disclosure -- your Lordship has looked at the issue of disclosure, we would be starting from a standing stop in relation to the production of that material. We say that on its face, it is extremely onerous. There obviously have been issues in the Sportradar case with the timetable for disclosure in those proceedings. The cut-off date that would seem to be particularly important in the Sportradar case is the deadline for expert reports. That, as we understand it, is in May. We simply don't see any realistic prospect of us being able to produce this sort of material in that timescale at all and obviously producing it in May is no good, as the experts will need time

to digest, process and understand it. So we respectfully suggest it simply cannot be done in a time useful to the Sportradar parties, on the assumption that the existing timetable stands.

My Lord, one also then has to weigh in the balance the additional costs. Because part of the rationale for the approach that we have been debating with your Lordship about the read-across is that there will be significant savings and costs if the SCM proceedings play, as it were, second fiddle to the Sportradar case. So that case which is fully constituted, in which disclosure and factual witnesses is about to happen. If that case proceeds, what is important is that we benefit from the synergies that Mr de la Mare has identified, and an order that we be compelled to give disclosure now, not for the purpose of our proceedings but for the purpose of the Sportradar proceedings, it destroys those synergies. It means that we are incurring costs now, even though our case, (a), is not yet fully constituted and, (b), is not going to be heard until some time after the Tribunal has given judgment in Sportradar. So, my Lord, we respectfully suggest that makes no sense as a matter of case management, to impose these upfront, front-loaded costs in relation to disclosure, given the solution that the parties, with your Lordship's assistance, have been working towards to minimise the risk of overlap and to ensure that synergies are achieved.

THE JUDGE: Yes.

MR PATTON: So, my Lord, I think those are really my submissions as to why there is not that justification for ordering disclosure, but if that were something you were minded to do, that would be very likely to have a significant impact on the timetable on the Sportradar case, and to destroy -- or significantly undermine -- the synergies which the proposal that we are putting to

your Lordship is intended to achieve.

THE JUDGE: If I were to consolidate, what we would have to do is identify the issues in the SCM pleadings --

MR PATTON: Yes.

THE JUDGE: -- that were going to be determined in the October action.

MR PATTON: Yes.

THE JUDGE: Step one.

MR PATTON: Yes.

THE JUDGE: We would then have to have disclosure in relation to those issues, and we would then have to have the factual and expert evidence going to those issues and we would have to do that all before the summer.

MR PATTON: Exactly. Your Lordship is absolutely right.

THE JUDGE: Okay, thank you very much, Mr Patton, I am very grateful.

Mr de la Mare, before you respond --

MR DE LA MARE: Of course.

THE JUDGE: -- I think it is appropriate that I hear from the other parties, so Mr Bates and Mr Edwards. I don't want long submissions, but I do want a sense of where the parties stand on, as it were, the spectrum of how to deal with the synergies. I appreciate you all have different perspectives, because not all of you are party to both actions. But I do think it is important that I have on record your views about the three options, broadly, that I think I have before me, which is complete disengagement one on extreme, consolidation of limited issues on the other and what I call the read-across option, which is flexible but obviously has implications for both actions, in that it lengthens first, albeit not by much, but involves the potential importation into the second action of a great deal of material from the first, if those synergies do exist.

So I don't know, Mr Bates, if you want to start on that? I don't require you to be long unless there are points which have not been adequately fleshed out by Mr Patton and Mr de la Mare, but I think it is important that I do hear from you all.

Submissions by MR BATES

MR BATES: Thank you, sir. I will be very short because Sportradar are essentially neutral as to the form of the intervention, subject to it not affecting the October trial and what is involved for the October trial. Because, of course, the context of the discussion today for the putative application for intervention/consolidation is that Sheridans and Sportradar, and no doubt Genius as well, are working hell for leather to make the October trial happen. That is a consequence of the challenging timetable set as a result of Genius' insistence that there should be the trial in October.

It seems to us to be plain that consolidation is not going to be appropriate, for all the reasons that have been discussed already. What is also clear is that there is a strong incentive for SCM to participate, because of the clean slate point, as Mr Patton put it.

So the next issue, then, is does SCM agree to participate in the proceedings? If it does agree to participate, then that plainly has to be on the basis that the outcomes of it, insofar as there is the overlap, they have to live with. If they do agree to participate, on what terms should that participation be?

That question has to be determined by reference to fairness. Is it fair to allow them to participate and make submissions if, for example, they have not provided any disclosure?

So that's where we see the debate as being. But obviously, within a framework of the practicality of what can be done. It seems to me at least, having listened

to Mr Patton, that it really would be extremely difficult to have anything from SCM, other than a fairly bare bones participation, without very much disclosure at all, if we are going to keep the timetable towards the October trial on track.

If Mr de la Mare, in those circumstances, wants to make submissions about why that is unfair, and SCM should not be allowed to participate on that basis, then that is open to him to do so. We would be neutral as to how the Tribunal comes out on that. But certainly anything that is going to put large amounts of new material into the proceedings now, when we are already struggling with the existing timetable, in my submission doesn't make any sense at all.

THE JUDGE: I am very grateful.

So if I can put your position in a nutshell, you are indifferent as to read-across or complete independence, provided read-across doesn't in any way interfere with or jeopardise the October trial, and you are willing to have Mr Patton and his team present, if that adds a day or so, but that's it?

MR BATES: So far as we are concerned, Mr Patton and his team are very welcome. But if I can just add this: we do see merit in Mr de la Mare's point about the need for clarity, of course, as to what SCM's case actually is going to be, if they do participate. It's obviously right that one cannot simply take that from the pleadings in the SCM case, but there are mechanisms for dealing with that in this Tribunal, such as, for example, a statement of intervention, where they can set that out.

Of course, the difficulty we have is we don't yet have such a document, which means that we don't have a reference point for looking at the fairness issue of their participation and what they could provide, but I respectfully suggest that's not a show-stopper and a mechanism can be found for SCM fairly quickly to

outline what it is that they will be arguing.

THE JUDGE: Thank you very much, Mr Bates.

Mr Edwards?

Submissions by MR EDWARDS

MR EDWARDS: Like Sportradar, Football Dataco have a neutral stance on this application. As you will see have seen, my client has one main concern and that is that deadlines are met and that the current trial date in October is kept. In light of the proposals before you and the fact that the court can accommodate further trial time, the risk of an intervention for deadlines appears to my client to be less significant than it has done previously and certainly intervention along the lines that your Lordship is primarily thinking of a read-across, that doesn't seem to significantly threaten the current deadlines at all.

One of the main differences between Genius and SoftConstruct is whether SoftConstruct provides any disclosure. It is fair to say that Genius seek limited disclosure. Certainly when compared with the disclosure that parties to these proceedings have provided. If this disclosure can be provided well in advance of the deadline for expert evidence in late May, my client would have no objection to that.

I think my client would also object to a position where SoftConstruct fully disengage from the process. We think that the ideal situation is that they do participate and that sort of common issues are determined insofar as they can be, or a middle ground, that there is some read-across.

THE JUDGE: If I summarise your position. If wishes were horses, you would want consolidation, but not at the price of losing the October trial. Therefore, your views as to the next best option is what I call read-across, but you are not in

favour of complete detachment.

MR EDWARDS: Yes, my Lord.

THE JUDGE: Thank you.

I suppose, Ms Potts, you are here. You are not a party, but I think for completeness, I might as well hear from you on the issues we are debating, because I would like all interested persons' views on the record, if only briefly.

Submissions by MS POTTS

MS POTTS: Of course. Thank you, sir.

IMG comes at it from a slightly different perspective from SCM, of course, which is two-fold really. The first is, as you are aware, the overlap between the two proceedings is in relation to the three football leagues. That doesn't concern IMG, so we are very much in a different position. Secondly, we are not actually a party to either of the sets of proceedings at the moment.

THE JUDGE: No, I know.

MS POTTS: Leaving that aside, on consolidation, it has not been entirely clear to me whether we would be talking about consolidation of the entire SCM proceedings or what I would call the FDC part of those proceedings. If it were to be the entire SCM proceedings, that would obviously be difficult because IMG, at the moment, is not even a party, so to consolidate and then have a trial in October would seem very difficult. Again, for the reasons I won't repeat.

In respect of read-across, IMG's position has been -- as I say, we are not a party. We appreciate that certain principles will be found in these proceedings that will have bearing on, of course, the SCM proceedings. And one of the reasons we wanted to be here today was to see how far that was going to be taken. Given the strong indication of quite a strong degree of read-across,

I think that is something I would need to take back and take instructions on. One thing I would say on that as well, sir, SCM does bring in, as you know again, this concept of Flagship Events. Read-across in the sense of as it relates to the UK football market, IC, if read-across is going to go considerably further than that -- as I say, we appreciate that some principles of course follow -- if there is going to be a much stronger read-across, that is important, again, to IMG. I think that would -- I am certainly not making any application now, we will take instructions but that is a different position, I think. Certainly things might follow, for example, access to documents. There is a confidentiality ring. If there is going to be a strong degree of overlap and read-across, then IMG might need to take a different position, because otherwise it is very much on the outside and then could end up in proceedings where it is bound by principles and really hasn't had any input and didn't even have the information to be able to have any input.

THE JUDGE: Again, if I can articulate, in summary, what your position is, you are very much what Mr Patton would describe as a "non-party", and really what you are saying is that whilst you can see some sense in read-across, in the abstract, your client's position is fully reserved as regards whether, if and when you become a party to any of these proceedings, read-across would be appropriate. I, for one, can see that if you were, for instance, joined post the first trial, say, that would be very late in the day. You would have a pretty strong case for saying that you have been deprived of the ability to intervene in the first trial and you see absolutely no reason why a judge should try your proceedings with the baggage of the earlier case.

That may or may not have attraction as an argument, but it certainly seems to me a point you ought to be entitled to make.

MS POTTS: Exactly, sir.

THE JUDGE: I am grateful.

Mr de la Mare, one last intervention before you reply.

Mr Patton, I think it was Mr Edwards who mentioned a statement of intervention or some form of statement of position. That is usual in an intervention. It probably would assist in terms of identifying differences and similarities in the common cases. I really have two questions.

First of all, what is your client's position on the provision of a statement of intervention? Secondly, when would it be most helpful for that to be produced?

MR PATTON: My Lord, I can't see any objection to it requiring a statement of intervention in principle, if we are entitled to make submissions. You could call it a statement of intervention and, you know, there would be a question of the label rather than the substance.

What we do respectfully suggest, it would be very difficult for us to produce one at this stage, where we have not had access to any of the documents in the Sportradar case. What I was going to propose -- would you mind if I took instructions?

THE JUDGE: I think we are transcribing this, aren't we?

MR PATTON: We do have transcribers.

THE JUDGE: So we normally take a transcriber break mid-morning. Since we started at 9, I think I can deem this as mid-morning. So I will rise for five minutes and you can all, as necessary, take instructions.

So we will resume at five past 11.

MR PATTON: I am grateful.

(10.56 am)

(A short break)

(11.05 am)

MR PATTON: I am grateful, my Lord. I have taken instructions. We are very happy to put in a statement of intervention. We suggest that the most informative stage at which to do that is once the expert evidence has closed in the Sportradar case. That is when what is agreed amongst the experts will have crystallised, what will be live in dispute will have crystallised and at that stage we can identify the points on which we think we will be able to make submissions and then the parties in the Sportradar case will have that well before they prepare their own skeletons, for example, for the trial, so they will be able to address those or respond to them or acknowledge them at least, as they may think appropriate.

THE JUDGE: Thank you, Mr Patton. That is very helpful, thank you.

Mr de la Mare.

Further submissions by MR DE LA MARE

MR DE LA MARE: My Lord, topic 1, bindingness. We have had an interesting discussion and I think it is apparent that what the Tribunal is proposing is something novel. A novel solution to a well-known problem. Indeed it has caused all of the parties to change their position, not least my learned friend Mr Patton, who had been saying that our order had not gone far enough in terms of bindingness. He very much has retreated from that position, to the informal position identified by my Lord.

That has proved very helpful.

If I can summarise where I think we are at. We are at a combination of *ex parte Tal* and *Henderson v Henderson*, or a weaker variant of *Henderson v Henderson*. What my Lord is effectively saying is: you have had your chance to object to

me and the same Tribunal, or the CAT, if the competition issues in SCM are transferred to the CAT, or if you employ the same two hats methodology. You have had your opportunity to object to that being heard by the same Tribunal. I am not deciding whether I will do or not but it's on the cards and you can't object to that, if that's what we decide to do. And Mr Patton has very clearly waived any right to object, as has everyone else who's affected by that decision. So that's important. That is very important indeed.

THE JUDGE: Apart from Ms Potts and we need to be clear about --

MR DE LA MARE: I will come to Ms Potts. Certainly the FDC, Sportradar, and SCM and my clients. I am not hiding from it, my clients have waived that right. So we are all going to get consistency from having the same fact-finding and law finding Tribunal deal with the same issues.

The reason why I say that is an exhibition of *ex parte Tal* and *Henderson v Henderson*, is I expect that any party that seeks to move that Tribunal from decisions it reached in the earlier case, is going to have to show that the earlier decision, by dint of further materials or argument or what may be or developments in the law, was obviously wrong. That is the test in ex parte Tal, to persuade one coordinate branch, generally Divisional Court or court of first instance, to depart from another decision of the same division.

The reason why there is a whiff of *Henderson v Henderson* is my Lord has been very clear that what you are not going to tolerate is any type of ambush. So what is incumbent on my learned friend Mr Patton to do is if he sees us going astray or if he sees us adopting a line of argument that, effectively, he wishes subsequently to falsify, at the very least to put up his hand and say "we don't agree with this analysis and we are going to be arguing something completely different in the future", and then the Tribunal can grapple with the

consequences of that, whether or not the flag identified by Mr Patton and his clients can be addressed or should be addressed because it goes to issues that have to be decided or whether the flag can be circumnavigated because it goes to an issue that doesn't have to be decided. But what there needs to be is clarity, not ambush. So that's the second point.

And that does impose some substantial burdens upon Mr Patton and his clients in terms of transparency at the end of the day, as to what they intend to be arguing in due course.

That being so, and that is the approach that everyone seems to be urging upon the court, the form of order, as proposed by both us and by Mr Patton's clients, are going to need some substantial reworking, but so be it. We are entirely content with that solution. Why? Because we are confident that the market definition exercise ultimately is the same one, and is going to call for the examination of all of the types of considerations that SCM have raised in their case, as part of an accurate and comprehensive analysis of how this set of interrelated markets actually works. So you are actually going to have to grapple with many of the things ventilated in their pleadings in any event, in the course of market definition.

What one can see immediately, for instance, if you contrast the Sportradar proceedings with the SCM proceedings, is there is a much greater granularity about all the different sublevels of the markets and the different players and the way that data is sold. Part and parcel of the emphasis upon the turnkey solutions and the demands of small bookmakers, all of that is going to have to be grappled with anyway and, indeed, the position of small bookmakers appears in Mr Bates' clients' pleadings in a slightly attenuated form in any event.

So that's that issue. I am not deaf, I have seen the mood of the room, or of the court, in relation to disclosure. It was never our case that there should be full-blown consolidation of all issues or, indeed, anything beyond that. We simply were saying that, effectively, the consolidation route was the route by which to embrace or require disclosure to be provided. But my Lord has made it clear that you don't think that is logically or properly linked to the halfway house, and therefore the consolidation option being out the window, because of the impact which we are all agreed to avoid on the Sportradar proceedings, that being out of the option, it follows that the disclosure that we sought will not be ordered. I am not going to fight against the points my learned friend has set out, many of which we disagree with, not least the questions of timing, not least because the categories of disclosure which Sportradar provided, pursuant to the expedited disclosure, were provided on a rolling basis within a couple of months and there has been long notice of what we are seeking and it is really not very different at all.

That is water under the bridge, given what my Lord has said, with one proviso. That proviso is this in relation to the Latham report. We still don't understand on what basis it is suggested that the Latham document is not relevant and is not disclosable, even if it concerns a provisional theory of harm. It is a provisional theory of harm based upon, presumably, careful and, presumably, appropriately full -- as full as was possible in the circumstances -- instructions from one of the five key market participants as to how this market works. Here is the important thing: it was the basis of the series of pleading amendments made by SCM, in order to avoid strike out or summary judgment. I am sure unintentionally, but my learned friend somewhat misdescribed how the Latham report came about.

We applied to strike out the original claim. My learned friend fundamentally repleaded their case, and in support of their repleaded case, and in order to prove that it was arguable in competition law terms, they filed Mr Latham's report. That explains why it contained a plausible theory of harm.

It was that theory of harm that RBB then engaged with and it was that theory of harm we then addressed in our pleaded response.

Now that being so, I go back to the point which was unanswered. How is RBB to put that report out of its mind and the theory of harm it contained? There is no fair or reasonable basis on which it can be expected to do so. And if RBB are entitled to rely upon it and should be given permission to rely upon it, even allowing for its provisional status, how is it fair that the same report is not available to the experts instructed by Sportradar and FDC if they want to see it? They may not, that's up to them. But in those circumstances, that report, at the very least, should be available to all the parties. The court will make of it what it will at the end of the day, or will make, more accurately, what it will of the expert evidence, so far as it refers to that theory of harm, and addresses it and says "we understand the theory of harm, here is now the totality of the data in the data room. We have worked the numbers, we have run the model, it doesn't work." Or Mr Bates says, "we have run the numbers, it does work but only in relation to FDC", or what have you.

That is where you are going to be ending up. There is no unfairness to Mr Latham or to my learned friend's clients in effectively saying that provisional theory of harm should be available to all of the experts, for the experts to engage with and address, to the extent that they think relevant.

That being so, we don't think there is any objection at all in relation to that material. It goes some way to providing what we need by way of the case to be met,

pending the extent of intervention which is now not going to come until the close of expert evidence. And that is a state of affairs which we would suggest is undesirable, unless we are entitled to take the economic case to be made as essentially captured in the pleadings, as formulated in the light of the Latham report.

So an intervention statement after expert evidence works just fine, if we are all allowed to refer for whatever ends to the Latham report. It is considerably more unfair if it doesn't, because then we don't know what case it is that our experts might have to address or meet that might ultimately prove to be advanced by SCM. So that's why we say the Latham report is in a particularly different category. I don't press the point in relation to the disclosure of the instructions, et cetera, underlying it. It will be sufficient for our purposes if we can simply refer to that report and the theory of harm it contains.

Then a trial date. It was suggested -- I can't remember by whom -- that it was us that had been pressing --

THE JUDGE: You don't need to. It is not --

MR DE LA MARE: It is not true.

THE JUDGE: It is not --

MR DE LA MARE: It is not of much interest but it is simply not true in any event.

That said, as for the suggestion -- very helpful as ever -- from Mr Bates for a formal statement of intervention, we would support that and invite that it be directed. Because it will go at least some way down the course of giving us notice of what it is that SCM intends, in turn, to turn up and argue.

That then, lastly, leaves the position of Ms Potts' client. True enough that her client is not yet a party to any of the SCM proceedings. But with respect, it is not relevant for two reasons. It is not relevant because my learned friend

Mr Patton was quite wrong to suggest that the issues in relation to IP joinder have anything to do with the issues before the court now. They are entirely irrelevant.

Whether or not the Argentine volleyball association, whose agreements are not impugned by competition law, is or is not yet properly joined to the proceedings, is irrelevant to the issues that are the issues produced by the defence and counterclaim. The only parties impugned by the defence and counterclaim are my clients, FDC and IMG. All are fully sighted of the pleadings and the arguments being made in both sets of proceedings. All have had the opportunity to address my Lord in relation to the question of informal bindingness or the halfway house, as you have styled it, and of course, entirely sympathetic to the fact that my learned friend Ms Potts may wish to take instructions and may wish in due course to ask for similar procedural rights to those afforded to SCM. That seems entirely the right solution.

But with respect, both her clients and Mr Edwards' clients have the same dilemma in many ways as SCM. They have to keep an eye on the issues more broadly and decide how to navigate through the Sportradar proceedings with that risk and that potential for read-across in mind. It is not a problem for Mr Edwards' clients because they are already fully participating. It is a problem for Mr Patton and it is addressed through his client's intervention as suggested, and it is capable of being addressed by my learned friend Ms Potts' clients, should they be minded to intervene.

With respect, IMG, notwithstanding the fact it has not yet been formally joined to the SCM proceedings, is not in any substantively different position. It is fully sighted of the issues and it will take a risk -- I say it no higher than that,

because my Lord will rule upon it if necessary in due course -- it will take a risk that it is stuck with the determination of the Tribunal, if adverse, unless it can point to some reason why it is obviously wrong or there is some good reason why it shouldn't be binding on IMG.

Obviously, in relation to arguments that are ultimately directed at the validity of agreements concluded between IMG and my clients, one cannot conceivably have a situation in which we are stuck with a result and IMG are not. That doesn't make any sense at all. So that particular vipers' nest will have to be navigated in due course.

But the whole point of us putting IMG on notice for today was to give them a fair opportunity. They have heard what you said, and will no doubt take informed tactical decisions accordingly.

Unless there is anything else I can assist on, that is it, for the thorny topic of intervention.

THE JUDGE: Thank you very much, Mr de la Mare.

Mr Patton, on the Latham report, let's leave on one side the jurisdictional question. More to the point, what do you say about the suggestion of Mr de la Mare that it would be helpful to have that disclosed into the Tribunal proceedings, if I can call them that?

Further submissions by MR PATTON

MR PATTON: My Lord, we do resist that. He said his point was unanswered as to how RBB were expected to put it out of their mind but that is simply the effect of CPR31.22 which my learned friend has always accepted is engaged by this interlocutory report. So that's what they have to do. If they feel they can't do that, then they may have to consider their position but that is not a real issue.

THE JUDGE: No, I think the point that attracts me is that it might serve as a means

of informing the court in action 1 as to what may emerge in action 2. In other words, it assists on understanding the synergies or whatever the opposite of synergies are, and so assist in the read-across process. That is really why I raise it.

MR PATTON: I understand that, my Lord. In a sense that's what gives rise to our concern. So what one can imagine is Mr de la Mare will be submitting -- the report we have had from Mr Latham, that is the report that informed SCM's pleadings. So you can take it that this is their economic case, he set it up. There's no other evidence about what their case is.

Even though it is not strictly an issue in the Sportradar case, we will get RBB to knock down that case. Comprehensively destroy it, he will say, no doubt and that will then be used as a stick to beat us in relation to SCM case. He will say: our experts have comprehensively addressed that report and, therefore, it has been demolished already, before we have even got started in the SCM case. That's the concern we have about the real unfairness of this, in circumstances where it is, as I say, an interlocutory report. It is one which Mr Latham will not be able to explain or expand upon. It is one where he will not be in the joint meetings.

It is made without references to the data and so on in the Sportradar case. It does seem there is a real risk of unfairness and we do take it that the reason Mr de la Mare wants it to be before the Tribunal in the Sportradar case is precisely for that purpose, to suggest that they have rebutted it, even though it may not actually be directly an issue before you.

It will then be said -- and this was the point I did want to come back to in a moment -- that since he has demolished the Latham report, as it then stood, we have one hand tied behind our back in the SCM case. So that is really our

submission on that.

My Lord, if I may, there is a slight risk of what you might call the battle of the forms in the submissions before your Lordship, in the sense that there were exchanges between me and your Lordship in which you expressed quite, if I may say so, subtly and flexibly, the concept you had in mind of read-across. Mr De La Mere, completely understandably, has sought to ramp up the effect of what your Lordship has said.

THE JUDGE: There are certainly a few steroids in there.

MR PATTON: Exactly so, my Lord. He has added in *Henderson v Henderson*. He says you will not tolerate ambush, whereas I recall your Lordship saying you would take a dim view of rabbits being pulled out of a hat and so on. I only mention that to make clear that I am not subscribing to Mr de la Mare's steroidal version of your Lordship's observations. If those are put on the record with a view to being another stick with which to beat us later. I take it that is understood.

THE JUDGE: I will be making a ruling.

Thank you very much, Mr Patton.

Mr de la Mare, do you have anything to say on that?

Further submissions by MR DE LA MARE

MR DE LA MARE: I mention, my Lord, if we are talking of dim views, you are going to take a dim view if we set up some entirely collateral attack upon the Latham report as a forensic exercise for that exercise's purpose alone but if, on the other hand, the Latham report contains material analysis of the theory of harm which needs to be addressed in a sensible and comprehensive fashion to explain how the market works, I am sure my Lord will think that is a useful exercise to be undertaken. We are obviously going to cut our cloth to meet

the case we have to make which is that primarily set by Mr Bates' clients.

But the whole issue of whether or not there is in fact a multiplicity of Flagship Events, is, on any analysis, a relevant one to the question of market definition, and how SCM approaches that issue, even on a provisional basis, is a relevant and informative input to the exercise that has to be undertaken.

So I think you can trust, with respect, my clients to act in a sensible and balanced fashion. If you don't, it will be my learned friend who is complaining and saying that this is an artificial exercise, et cetera, and all grossly unfair and then you can then rule on the issue de bene esse, once you actually understand and have sight of the full expert case which is perhaps the better time on which to take a view on those issues.

THE JUDGE: Thank you very much, Mr de la Mare.

(Ruling given - Extracted)

Post-Ruling Discussion

THE JUDGE: That concludes my ruling on the question of consolidation or read-across. I am going to order read-across. I want to make it clear that if SCM consider that it helps to disclose material in the SCM claim, there is of course no bar to that, but I am not going to order it. It is a voluntary process that needs to be informed by the overriding objective on SCM to make this process work, so far as possible.

MR DE LA MARE: Thank you, my Lord.

Can we deal with the question of stay of the competition claims in SCM next?

THE JUDGE: Yes.

MR DE LA MARE: In my submission, it is very simple. It follows inexorably from what my Lord has ruled that there shouldn't be an inflexible, all circumstances

stay of the kind sought by SCM. And that, my Lord, should address areas of overlap between the IP case and the competition case, as they may present themselves in that case, as they arise from time to time, in full knowledge of what you are doing in this litigation.

Let me give you a very simple example of the kind of problem I have in mind. Let's imagine that rosy prospect of a land beyond the IP joinder issues, when we start talking about disclosure. Let's say the issue in relation to disclosure is one in relation to the disclosure of the extent of what one might call the off-tube operations. Now the off-tube operations of SCM are obviously relevant to the competition claims, as I have described, but they are also relevant to the IP claims.

Why? Because they go to one of the key issues: has there been scraping, has there been infringement? The larger and better documented the off-tube operation is, in relation to a particular sport -- let's say it is the FDC data holding -- then the better the argument that there has not been any scraping. One could give a number of other examples and the DRAs, for instance, are disclosable, both for competition purposes and for relevant purposes for working out what a reasonable licence fee might be. Any number of examples.

So instead of setting a rigid straitjacket that says all the competition issues in that case are stayed, I invite my Lord to address that issue as it arises in those proceedings, on a nuanced basis, knowing what you know, of how you are running this litigation. We are obviously not going to invite you to take any unnecessary and wasteful steps in the light of what is happening in these proceedings. But we equally don't think you should shut down those proceedings for all purposes, in the way that, effectively, SCM invites you to.

THE JUDGE: Mr de la Mare, I think I agree with that.

MR PATTON: I don't disagree with it. In the light of the debate it would seem sensible to revisit this in the SCM case, once it's properly constituted.

THE JUDGE: Exactly. It seems to me that is a matter for specific case management of the SCM matter, and to make any order would be wrong.

MR PATTON: Absolutely, today.

In that event, I am not going to respond to the merits -- we can deal with that later.

THE JUDGE: I don't think there is any point. I think we have all kinds of questions about whether one should do anything until the matter is constituted.

MR PATTON: Yes.

THE JUDGE: That gives rise to questions of speed versus having all the parties before one. I am not going to say anything. I can see the sense of having disclosure on a point which will take time otherwise, whilst the matter is constituted, but equally, I can see an argument for saying you should have everyone in the court before you do disclosure.

MR DE LA MARE: Absolutely. Each of those debates is going to be turning on the particular facts of the particular issue.

THE JUDGE: Exactly. So we are all in happy agreement, so I am not going to make any order today.

MR DE LA MARE: Before we leave the SCM proceedings and move to the private grief of the timetable in Sportradar, can I just put this marker down. You'll be relieved to hear you will not be hearing from me in relation to the IP joinder issue but the intention is to bring that matter before the court soon and in that connection, the counsel who will be appearing in that case, the IP specialists, I think are available in the week of 14 or 21 March.

THE JUDGE: They better speak to my clerk.

MR DE LA MARE: We will set that ball rolling.

THE JUDGE: There is going to be a problem in my availability going forward.

MR DE LA MARE: We are going to have to liaise through the usual channels.

THE JUDGE: Liaise through the usual channels.

MR DE LA MARE: As ever, my learned friend Mr Roberts jumps to his feet and his availability is in dangerously short supply, so doubtless we will be hearing about that.

THE JUDGE: We will.

Mr Roberts, I don't want to cut you off before you have said a word, but I would want to get this on as quickly as possible. It may mean releasing the application to a different judge, because I am going to be starting a series of five week actions, of which this is the third, in around March. So there may be real problems.

MR ROBERTS: My Lord, hope always springs eternal in the rose-tinted spectacles of my learned friend, Mr de la Mare, particularly as regards the IP joinder.

We have not seen the application, we have in fact been told in terms by Fieldfisher that we are not going to see the application until it is issued and served. So even though we have said "can we see it so we can consent to it, so we can see the notification you have made?" They have said, "no, nanny knows best, we will do what we did last time and simply present you with a fait accompli", and therefore we agree whether or not you are available at the end of March. We say before we know who is going to be at that hearing -- it could be IMG, it could be FDC, they are two of the parties to be joined, last we heard anyway -- there are all sorts of moving parts. Therefore, simply trying to reserve time in March before your very busy lordship, we say is quite the wrong exercise.

My learned friend said he was Cassandra, I am trying to prevent him being Sisyphus

and being crushed once again in his attempts to join IP parties and doing so wrongly.

THE JUDGE: I will not invite you, Mr de la Mare, to articulate which particular character from Greek mythology you are.

MR DE LA MARE: I feel the burn, I think my 14-year-old would say. Fortunately, it is Ms Lane who is going to have the unparalleled pleasure of arguing this issue out with Mr Roberts.

But if my Lord is unable to hear it, it might be sensible, since it is a very geeky, very hardcore IP issue of the kind beloved by Ms Lane and Mr Roberts, if it was released to an IP judge.

THE JUDGE: I'm not going to release it until I have seen the colour of your money.

MR DE LA MARE: Of course. That is for others, my Lord. I am a humble competition lawyer and I will move over to those who know better.

THE JUDGE: The depressing fact is I am an IP judge, so the patents list will have me in mind anyway. So it is really a question --

MR DE LA MARE: An available IP judge is what I should have said.

THE JUDGE: That is exactly right. So it may be that if Mr Justice Meade or someone else has the capacity, then certainly I will not let my availability slow down what is clearly an important matter, to progress the SCM claim.

MR DE LA MARE: Fantastic.

That then leaves the Sportradar matter. For once, I have some friends. Mr Bates and I are in complete agreement that precious though Ms Smith's diary is, with respect, it is not a sufficiently good reason to set in the face of the additional two weeks that both Sportradar and my clients say is necessary in order to do everything they have to do.

THE JUDGE: The debate is an adjustment of three weeks versus an adjustment of

one week.

MR DE LA MARE: Correct. Could I just give you just a little bit of context?

THE JUDGE: Yes.

MR DE LA MARE: Because I think the pain felt by Sportradar and Genius is common in this respect. We have reviewed some 245,000 documents at first level, of which there were over 50,000 reviewed at second level, and an additional 29,000 reviewed straight at second level, leading to disclosure --

THE JUDGE: Can I cut to the chase.

MR DE LA MARE: Yes.

THE JUDGE: I mean, the fact is that the disclosure was six weeks later than anticipated; is that right?

MR DE LA MARE: I think that's right, yes.

THE JUDGE: That's what I think I gleaned from the skeletons. I don't want to get into why, because it seems to me that doesn't matter. What matters is the adjustment that needs to take place. Given that the disclosure was on any view, substantial, it seems to me as a rule of thumb, that a week is not going to be enough.

Three weeks seems to me to be halving the time, effectively, that you would have had, had disclosure taken place in the right time-frame. So my initial take is that you are not acting unreasonably in asking for three weeks.

So perhaps the answer is that you save your firepower for three weeks in reply and I hear from Mr Edwards as to why a week is more appropriate.

I am just looking at the time that is lost. I don't want to get into whose fault it is, because frankly, unless it is pretty egregious, what we are really talking about is what is needed to achieve a fair disposal of this matter. The fact is what we are doing is shaving off three weeks of the time that was available between

disclosure concluding and the factual witness statements being put in.

MR EDWARDS: Can I start by identifying the prejudice to my clients?

THE JUDGE: Of course. That is absolutely what I am interested in hearing.

MR EDWARDS: You will have seen from the correspondence and my skeleton that that principally consists of the fact that the senior members of my client's counsel team will not have time before the Easter holidays to have any input on the reply evidence. 25 March, which is the deadline proposed by Sportradar and Genius, is a Friday and the Easter holidays are from Monday 28 March onwards.

In a general sense, it is said against me that it is not normal for counsel to have input in the preparation of evidence. In straightforward cases, that might be right. However, this is complex and high value litigation. On the IP side of the claims, the Supreme Court will soon be hearing an appeal in the Racing Partnership litigation on very similar issues and the claims being made are really at the cutting edge of intellectual property litigation.

On the competition side of the claim, this is a very complex market. There has not been considered any previous decisions in this territory. So in short, many features of this litigation are unprecedented.

THE JUDGE: 25 March is when Mr de la Mare's clients will put in their witness evidence.

MR DE LA MARE: Yes, my Lord.

THE JUDGE: We then have Easter. What is the date presently envisaged for your reply evidence?

MR EDWARDS: My clients are seeking an earlier date on 14 March, so actually the difference is 11 days between our two proposals.

THE JUDGE: 14 March is the date you are saying.

MR EDWARDS: Yes.

THE JUDGE: 25 March is what Mr de la Mare seeks.

MR EDWARDS: Yes, my Lord.

THE JUDGE: What is the squeeze? In other words, the evidence that you want to put in reply, when is that envisaged to come in?

MR EDWARDS: I think it's envisaged to come in on 22 April.

THE JUDGE: 22 April.

MR EDWARDS: A particular point on that -- well, I will start by making the general point that this is the sort of litigation where you would expect all members of my client's legal team, including leading counsel, to have a significant input into the evidence, including the reply evidence.

But on the timetable agreed between Genius and Sportradar, there is this four day period between the end of Easter, which is on 19 April, and the reply evidence deadline on 22 April, which is --

THE JUDGE: Can we add a week to 22 April? Can we say 27 April instead?

MR DE LA MARE: From our perspective, we can. We will be interested in hearing what Mr Bates says.

MR BATES: I am told that also works for us.

THE JUDGE: Okay. Why don't we do that. Does that solve the problem?

MR ROBERTS: That is good then. We can agree that as well.

THE JUDGE: Okay, good. That, I think, is a better solution.

MR ROBERTS: I think there is one other dispute on the timetable.

THE JUDGE: We will have to adjust the dates in light of that change.

Do we see any other problems with dates going forward? That is good to hear. What I suggest is that the parties draw up an order which includes not just what I have said in the read-across matter, but also, obviously, the dates. If

there is any dispute, then I will resolve it on the papers, if it is only dates.

MR DE LA MARE: My Lord, in terms of the read-across, I think Mr Patton is right that whatever is provided for the read-across, probably needs to be in the SCM order.

THE JUDGE: I agree.

MR DE LA MARE: But this is the proviso. I can see it is going to be quite an exercise, capturing the nuance of what my Lord has set out in his judgment in an order. It is nothing quite so -- to go back to my earlier word -- binary as binding or not binding. I suspect Mr Patton and I are going to need to put our heads together, collaborate and produce something that seeks, as best we can, to capture (a), my Lordship's concerns and (b), the flexibility that you envisage is built into it.

THE JUDGE: Yes.

First of all, let's get a separate order on timetabling done in the October claims --

MR DE LA MARE: Yes, that should be relatively straightforward.

THE JUDGE: Let's do that independently. The harder question is, as you say, the nature of the read-across order.

It seems to me you need an order in both actions, don't you? Because you need an intervention in the October claims --

MR DE LA MARE: We have captured the intervention, I don't think that is going to be hard to capture, my Lord.

THE JUDGE: That's right. I think you are right that the bindingness question is harder. I am wondering whether one should, instead, actually simply make no order --

MR DE LA MARE: That's one option.

THE JUDGE: -- on the intervention.

MR DE LA MARE: And we have your judgment.

THE JUDGE: We have the ruling. I will get, in the usual course, a transcript of that.

MR DE LA MARE: Again, going back to sliding scales, there are three options. The parties can have a crack, we can have no order or my Lord can have a crack at capturing what you said in the judgment.

THE JUDGE: What I am going to do is I am going to suggest this. I am going to invite you, Mr de la Mare and you, Mr Patton, to get a first cut of the transcript of my ruling to correct any errors, infelicities and otherwise. I will then review it, so that there is as much clarity as one can obtain in that. Then I will hand it down.

So I am inviting you to do perhaps a little bit more than the just typographical corrections, just to make sure that it is capturing what there is. I will then edit it further.

MR DE LA MARE: Understood, my Lord.

THE JUDGE: Then I think we can see whether we need anything beyond that.

MR DE LA MARE: Yes.

THE JUDGE: I don't think we would do so, because in a sense, given that I am going to be implicated in both actions and given that I am articulating a concept of non-bindingness rather than bindingness, ie a substantial discretion, it may be lesser said the better.

MR DE LA MARE: Yes.

THE JUDGE: So I don't think, Mr Patton, you need anything in the SCM action to make this work. Really orders are just about making things work rather than recording why one is doing things.

MR PATTON: I respectfully agree, my Lord. There is nothing that you need the parties to do or to take further. Your Lordship has made your position clear.

The judgment will speak for itself. Obviously we have the particular advantage that your Lordship will be the judge or is likely to be the judge in both cases --

THE JUDGE: Yes, it may be, if I could not do the second action, one might have to revisit that.

MR PATTON: Yes.

THE JUDGE: But I think for the moment let us see what the ruling looks like.

MR PATTON: Yes.

THE JUDGE: Let's include in the order, the order for intervention and the time for the statement of intervention.

MR PATTON: Yes.

THE JUDGE: And leave it at that.

MR PATTON: Yes.

MR DE LA MARE: Given my Lord's ruling and my learned friend's concession, we don't need to do anything more at this stage about the stay issue.

MR PATTON: No.

THE JUDGE: No, that is for another time.

MR DE LA MARE: I am grateful, my Lord.

THE JUDGE: Thank you all very much for your assistance. I am really very grateful to you all for at least attempting to try to lance the consistency boil. I think we have made some progress but I am really very grateful to you all. Thank you very much.

(12.23 pm)

(The hearing concluded)